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NOTE AND COMMENT

ARCHAIC METHODS OF VALIDATING A CONTRACT—THE "BLOW" AND THE "LIBATION."—Sir Henry Maine tells us that at the dawn of Roman jurisprudence the term in use for contract was one which is very familiar to students of historical Latinity. "It was *nexum*, and the parties to the contract were said to be *nexi*." MAINE, ANCIENT LAW [Ed. 10, by Pollock], 328. Manilius, a Latin antiquarian, describes *nexum* as *omne quod per libram et aes geritur, in quo sint mancipia*, "every transaction with the copper and the balance, in which class are mancipia." VARRO, DE L. L. 7, 105. Mancipation was a conveyance, and Maine says that this citation appears to confound Contracts and Conveyances, which in the philosophy of jurisprudence are not simply kept apart but are actually opposed to each other. He thinks, therefore, that we have here 'indications not to be mistaken of a state of social affairs in which Conveyances and Contracts were practically confounded." MAINE, 329. We may well expect, then, that the validating mark of the early contract would also be the validating mark of a conveyance. Maine resolves this apparent incongruity by pointing out that in the infancy of jurisprudence legal conceptions are general, and with maturity the change is in the direction of specialization. At first there was but one ceremonial

for solemn transactions, that was *nexum*. And it seems that the earliest of these was a conveyance. With the advent of the Contract, precisely the same forms which were in use when a conveyance of property was effected seem to have been employed. Soon after comes the "period at which the notion of a Contract has disengaged itself from the notion of a Conveyance." MAINE, 331. Then "The transaction 'with the copper and the balance,' when intended to have for its office the transfer of property, is known by the new and special name of Mancipation. The ancient *nexum* still designates the same ceremony, but only when it is employed for the special purpose of solemnizing a contract." MAINE, 331. "It is likely that a very slight perversion of the *nexum* from its original functions first gave rise to its employment in Contracts, and that the very slightness of the change long prevented its being appreciated or noticed." MAINE, 332.

Gaius describes a conveyance by mancipation as follows: "in the presence of not fewer than five witnesses [These witnesses, according to Huschke's view, represent the five Servian classes, that is, the Roman people. 29 LAW QUARTERLY REV. 142], citizens of Rome above the age of puberty, and another person of the same condition, who holds a bronze balance in his hands and is called the balance holder [symbolic of the Roman magistrate], the alienee holding a bronze ingot in his hand, pronounces the following words: 'This man [usually a slave] I claim as belonging to me by right of quiritary and he is purchased to me by this ingot and the scale of bronze.' He then strikes (*percutit*) the scale with the ingot, which he delivers to the mancipator as by way of purchase money." POSTE'S GAIUS, I, 119. Mancipio = manus-capio, which is to take with the hand, as taking a person or thing in this way. Movables and immovables subject to conveyance were thus alienated, and Gaius tells us that in the case of movables the person or thing "must be present to be mancipated; indeed, the alienee must grasp the movable to be conveyed with his hand, and from this manual prehension the name of mancipation is derived." GAIUS, I, 121.

In GAIUS, I, 119, *supra,* the word used to describe the striking of the scale was *percutit. Percutit* comes from *per-cutio,* which means to strike through and through, or to thrust or pierce through, as with a spear. We shall discover that the use of *percutit* instead of *ferit* (which means to hit, or strike an ordinary blow) is very significant.

In the original lawsuit, the *legis actio sacramento,* we had this same spear stroke. In the presence of the Praetor "The claimant held a wand (*festucam*) [*festuca:* manumission rod], and grasping the slave or thing over which he claimed dominion, said: 'This man I claim as a proprietor, by due acquisition, by the law of the Quirites. So as I said, see! I have covered him with my wand (*vindictam*) [*vindicta:* the staff or rod with which a slave was touched in the ceremony of manumission, a liberating rod],' whereupon he laid his wand (*festucam*) upon the man. The adversary then said the same words and performed the same acts." GAIUS, IV, 16. When the first claimant asked the second on what title he founded his claim, the reply was, "I perfected my title when I covered him with my wand." GAIUS, IV, 16. And in the same passage Gaius says, "Accordingly the law

of property is administered in the Centumviral court at the present day under the symbol of the spear (*hasta*)." The spear or its symbol, then, seems to have been important for purposes of acquiring or claiming title to all kinds of *res mancipi,* including land, in which case a clod was brought into court as representing the land. The lawsuit, it would seem, was nothing less than a symbolic fight, and back of this symbolic fight there was undoubtedly the real fight which we can readily believe was one of the earliest means by which primitive man acquired title to the property of others.

The use of fiction seems always to have been a fruitful means for permitting the law to grow. Out of the *legis actio sacramento,* which was a lawsuit for adjudicating title, there was evolved the *in jure cessio, i. e.,* the transfer of a right by means of a *confessio in jure,* thus effecting a conveyance by means of a fictitious lawsuit. The transferee becomes the fictitious plaintiff, and the transferor the fictitious defendant, who allowed judgment to go against him. The forms of the *legis actio sacramento* procedure were employed. See SOHM'S INSTITUTES (Ed. 3), 251, 252.

Thus the important symbolism of the blow (*percutit*) is found in the original lawsuit, the *legis actio sacramento* described in GAIUS IV, 16, *supra,* it is retained in the *in jure cessio* (fictitious lawsuit to effect a conveyance), and persisted in the *nexum* transaction, which was probably both a method of conveyance and a means of creating a binding obligation (Contract). Niebuhr's view of the *nexum* transaction is that the borrower sold himself by a mancipation in the usual form to the lender, subject to a suspensive condition—the mancipation was not to take effect till default in payment, and a resolutive condition—the mancipation is destroyed by payment. Niebuhr was an historian, and the objections to his theory are juristic—a self-mancipation is entirely unknown to Roman law, a conditional mancipation is against all principle, and the supposition of a trust imposed upon the creditor would be unreasonable, since the person (debtor) entitled to enforce it would be in the creditor's power, in whom his right of action would be merged. See 29 LAW QUARTERLY REV. 141. The more commonly accepted view concerning the nature of the *nexum* transaction is that of the jurist Huschke. "In his view *nexum* covers every debt arising *per aes et libram,* including a loan so contracted. This loan took the form of a weighing of the metal to be lent, before *libripens* and witnesses, accompanied by a formula spoken by the creditor in which he declared the debtor *damnas* to repay him. These *nexum* debts were precisely equivalent, so far as they were liquidated, to a judgment debt (*iudicatum*), and were therefore enforceable by the creditor without judgment on the person of the debtor by *manus iniectio.* They stood to *iudicatum* as *mancipatio* to *in jure cessio.*" 29 LAW QUARTERLY REV. 141, 142. The following are the earliest sources of our information concerning *nexum:* VARRO, DE L. L. 7, 105; FESTUS, 165, 173; GAIUS, II, 27; FRONTINUS (Ed. Lachmann), 36; ORELLI, 322. For discussions of *nexum,* see 29 LAW QUARTERLY REV. 137; ROBY, ROMAN PRIVATE LAW, II, 296; MUIRHEAD, ROMAN LAW (Ed. 3), 136; MAINE, ANCIENT LAW, ch. 8. Blackstone informs us that it was usual for a debtor to strengthen the creditor's security by executing a warrant of attorney to an attorney named by

the creditor, empowering him to confess judgment in an action of debt to be brought by the creditor; which judgment, when confessed, was binding. See BL. COM. III, 397. If Huschke's theory concerning *nexum* is correct, the transaction involves a judgment (adjudication of right or title), and certainly the significant blow (*percutit*) found in the *nexum* was necessary to the earlier judgment (*legis actio sacramento*) which we have already considered. The release from this *nexum* bond or judgment was effected in the same way as created, the debtor "strikes the scale (*percutit libram*) with a piece of bronze and gives it to him from whom he is freed as if for the purpose of payment." GAIUS, III, 174. *Percutit* is the word used to describe the blow in all transactions we have thus far considered—symbolic of the spear-stroke. *Ferit*, as we have already noted, has a different connotation. Thus our institutional evidence is corroborated by linguistic evidence.

We still have another ancient source, and it seems to combine with the spear-stroke a pouring out of blood. In describing the consummation of a treaty between the Roman and Alban peoples Livy writes: "After the agreement between the Roman and the Alban peoples had been recited, the Roman fetial priest said, 'if the Roman state shall be the first to fail in this agreement then do you, O God of Days, strike down (*ferito*) the Roman people as I here today strike (*feriam*) this pig * * *' and when he had said this he struck (*percussit*) the pig with a flint rock." LIVY, I, 24, 8-9. Here again the act which made the obligation binding was a blow in the nature of a spear-stroke, and described by the significant *percussit*. The fact that some form of *ferio* is twice used in the first portion of the passage might lead one to believe that the subsequent use of *percussit* was a mere stylistic variation on Livy's part, so alone it would be non-significant. But Livy's account has the marks of extreme antiquity. It is graphic, apparently the account of an eye-witness, and we may well assume that Livy has taken this from some annalist who has used the record of the fetial priests as found in a temple of the God. Scholars are generally agreed that the account of the *legis actio sacramento* given by Gaius describes a very early form of procedure.

There is still another dramatic feature in the transaction described by Livy, that is, the pouring out of blood which must have resulted from the transfixing blow. The sacrificial invocation with the killing of an animal and shedding of its blood seems to have been much used by early peoples. Such was certainly a practice among the ancient Greeks, who later substituted the blood of the vine for the blood of the animal. The Greek word for libation (to pour out) is *spendo*. We shall try to discover a relation between this act of pouring out of blood and the Roman Verbal Contract (*stipulatio*).

Maine tells us that the Verbal Contract was the eldest known descendant of the primitive *nexum*. The contract was "effected by means of a stipulation, that is, a Question and Answer; a question addressed by the person who exacted the promise, and an answer given by the person who made it." MAINE, 338. "The old *nexum*," says Maine, "has now bequeathed to maturer jurisprudence first of all the conception of a chain uniting the contracting parties, and this has become the Obligation in the Verbal Contract. It has

further transmitted the notion of a ceremonial accompanying and consecrating the engagement, and this ceremonial has been transmuted into the Stipulation." MAINE, 339. Thus the solemn conveyance which was the prominent feature of the original *nexum* was converted into a mere question and answer. The formal question in the Verbal Contract was, *Dari Spondes?* and the answer was, *Spondeo.* If other words were used, such as *Dari Promittis? Promitto,* the contract was of no validity. And Gaius says, "The formula, 'Art thou sponsor? (*Dari Spondes?*)' is so peculiarly Roman that it cannot be expressed in Greek, by translation, although it is said to have a Greek origin." GAIUS, III, 93. But we have already noted that *spondeo* comes from a Greek word which means to pour out. Such being the case, the reason why the exact words, *Dari Spondes? Spondeo,* were required to make a binding contract between Roman citizens becomes apparent—we have here a verbal symbolic libation coming from the sacrificial invocation with the killing and shedding of blood which made the older agreement binding. According to some authorities, says Gaius, the Roman Emperor may conclude a binding treaty with a foreign sovereign by verbal agreement if the *spondes* formula is used, but this, of course, creates no civil obligation enforceable by legal process; the enforcing process is war. GAIUS, III, 94. Having in mind the origin of the word *spondeo,* a treaty concluded in such fashion would appear to be employing the verbal symbolism for such procedure as the killing of the pig mentioned in the Livy account, with, as we may assume, the shedding of the blood.

If the above argument is correct, we may generalize our results as follows: In the very ancient account given by Livy we have the two dramatic features giving solemnity to the agreement, the blow and the shedding of blood. The former has come down in *nexum* contract, the latter in the *sponsio.* In the *nexum* the blow as a validating mark seems to have appeared in the *legis actio sacramento.* The *in jure cessio* is generally acknowledged to have been the *legis actio sacramento* compromised in course. The first of these adjudicated title, the second effected a conveyance. That the *nexum* is connected with the *legis actio sacramento* through the *in jure cessio* is proved linguistically by the appearance of the word *percutit* in the process *per aes et libram,* and the institutional connection is shown by the fact that the fight of the primitive lawless period is succeeded by the symbolic fight in the *legis actio sacramento;* this by the lawsuit compromised in course, *in jure cessio;* this in turn by the *nexum* contract, in which the blow alone survives. In the *sponsio* the "pouring out" appears in the shedding of blood in the original sacrifice, and persists in the stipulation in the original requirement that only *Dari Spondes? Spondeo* could be used. Gaius does not understand the significance of this, but etymological evidence seems to show that the early insistence on the use of exactly these words is a reminiscence of the pouring out indicated by the root meaning of *spendo.*

In widely separated times and places numerous instances may be found where the blow has been considered efficacious as the validating mark of an agreement. Brissaud tells us that in the feudal period, after the parties have come to an agreement "the buyer strikes with the right hand the palm of the right hand of the seller," and the sale is thus made binding. BRIS-

SAUD, HISTORY OF FRENCH PRIVATE LAW, CONT. LEGAL HIST. SERIES, III, 374. This may also be applied to other contracts, and "The clasping of hands, *'mutua manuum complexio,'* seems to be equivalent to the *'percussio manus.'* * * * In placing one's hand within the hand of someone else, one places oneself under his authority and in his dependence." *Id.* The blow with the palm of the hand is equivalent to the German "Handschlag" or the English "handsale." Blackstone says, "Anciently, among all the northern nations, shaking of the hands was held necessary to bind the bargain; a custom which we still retain in many verbal contracts. A sale thus made was called *handsale, 'vendito per mutuam manuum complexionem'* (a sale by the mutual joining of hands); till in process of time the same word was used to signify the price or earnest, which was given immediately after the shaking of hands, or instead thereof." BL. COM., II, 448. Vinogradoff gives an account of a part of the Roman and Indian marriage ceremony which he believes to have had a common origin some 5,000 years ago before the division of the races. "The bride and bridegroom concluded the agreement as to common life and perpetual union by giving the hand (handfasting), described in Rome as *dextrarum prehensio.* In Indian ritual the corresponding rite is called *panigrahana* (handshaking)." VINOGRADOFF, HISTORICAL JURISPRUDENCE, I, 251. Professor William D. Henderson, of the University of Michigan, in telling of an account given by his father, who was a native of North Ireland, informed the writer that in that district the "luck penny" is commonly used to validate a sale, the custom having been introduced from South Scotland. The vendee places a penny in the palm of his hand and strikes with it the palm of the hand of the vendor, the penny being transferred to the vendor in the process. The "luck penny" was never handed over by the vendee; the tradition had to take place by the blow. The blow is probably a survival of the ancient spear-stroke which was so essential to the passing of title. There seems to be, however, a dual significance in this transaction, for its name would certainly indicate that it has some connection with "luck money," which is a small sum "returned to a purchaser for good luck." BREWER'S DICT. OF PHRASE AND FABLE. But the passing of "luck money" was from vendor to vendee, there was no blow, and its only purpose was to insure that good fortune would attend the transaction. "In Yorkshire * * * it [luck money] is called 'fasten penny,'" which would indicate that it served a different purpose in that locality. NOTES AND QUERIES, 9th Ser., XI, p. 358.

The Century Dictionary says that "swat" is perhaps a variant of "swap." If this is true, it would appear that the *festucam imponebat* of the *legis actio sacramento* (GAIUS, IV, 16) and the *percutit libram* of the transfer *per aes et libram* (GAIUS, III, 174) may be related to the "swap" that effects a conveyance and depends for its validity on the Anglo-Saxon "swat" or the Teutonic "Handschlag" (BRISSAUD, *ante*) which accompanies it. We are all familiar with the fact that the American boy considers the agreement made with his playmate more binding after they "shake hands on it." With them, of course, the obligation created by the handclasp is moral instead of legal, but may we not assume that here is a reminiscence of the Teutonic "Handschlag"?

Thus far we have been concerned with institutions found among Indo-European nations, hence such connections as we have been able to establish are explicable. But turning to other sources, we may still discover institutions not wholly unlike those already examined. From a Semitic source we have this: "My son, if thou be surety for thy friend, if thou hast stricken thy hand with a stranger, thou art snared with the words of thy mouth, thou art taken with the words of thy mouth." PROVERBS, ch. 6:1, 2. Among the modern Chinese there is a practice of validating an agreement by a hand-stroke like that of the "Handschlag." This practice, however, may have an European origin. But from a very ancient Chinese record we have the following: "A formal agreement entered into by the feudal Lords, swearing that they should be bound by their words, was called a covenant under oath. If, however, a sacrificial animal was used in the ceremony, the transaction was called alliance." BOOK OF RITES, I, ch. 2, pp. 43, 44. The annotation relates that "The ceremony of forming an alliance, used by the ancient feudal Lords, was first to dig in the earth a square pit over which the sacrificial animal was put and slain. One of the parties took the sword and cut off the left ear of the victim, which was deposited in a red plate. The blood of the animal was taken and kept in a plate made of jade. The covenant was then written with the blood. The parties smeared their mouths with the blood and read over the terms of the alliance with their faces towards the north as in the presence of the spirits of the sun and moon. The document was then put upon the carcass of the victim and the pit was covered." This record was an official document authenticated by Confucius, so its date is about 500 B. C. Other form for making such an agreement could be employed, but "the most solemn one being to use blood." *Id.*, V, 11. This was true because blood was "regarded as life and as the most sacred element in the universe," and "was used in order to show the utmost respect and sincerity." *Id.* The blood of the hen, dog, or horse was used according to the political and social standing of the contracting parties. *Shih Kee*, Bk. 76, p. 2 (257 B. C.). "When Kao-ti [an Emperor] was alive he killed the white horse before the public and solemnly declared under oath, 'If anyone hereafter should attempt to make those other than members of my family feudal Lords, let him or her be killed like this horse'." *Id.* Bk. 9, p. 2 (194 B. C.). "Sun-chuen, not willing to do this, drew out the sword and struck the table with it, saying, 'Those who dare to present this kind of petition again shall be struck down as I do this table'." *Chinese Chronicle*, Bk. 26, p. 5 (209 A. D.). While crossing a river, Tsu-di, of the Tsing Dynasty, struck the water with an oar and swore in the following terms, "If I could not be successful in this service [suppression of an insurrection] and re-cross to my native town, let me be condemned as this water." *Id.*, Bk. 31, p. 3 (313 A. D.). In this material from Chinese sources we discover similarities with those of Indo-European origin, but the dissimilarities are even more suggestive.

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